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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

McQUAY-NORRIS MANUFACTURING COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 862

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF

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A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent issued a complaint charging petitioner with the commission of unfair labor practices under sections 8(1) and 8(5) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. Sec. 151-166 (R. 499-503; App. 239-243).* Respondent held a hearing pursuant to Section 10, subdivisions (b) and (c) of the said Act, at which oral testimony

* Page references to the original record certified by the National Labor Relations Board to the Circuit Court of Appeals are designated by the letter "R." Page references to appendix to petitioner's brief filed in the Circuit Court of Appeals are designated "App."

was taken (R. 1-405, App. 1-235) and exhibits presented (R. 401-1141; App. 236-490). The respondent made findings of fact (R. 1188-1196; App. 509-521) and conclusions of law (R. 1196-1197; App. 521), and issued an order (R. 1197-1198; App. 522-523)

(1) requiring Petitioner to cease and desist from

> "(a) Refusing to bargain collectively with United Automobile Workers of America, Local 226, as the exclusive representative of the production employees at its Indianapolis plant, excluding clerical and supervisory employees;
>
> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act."

(2) Requiring Petitioner to take certain affirmative actions.

Petitioner petitioned the United State Circuit Court of Appeals for the Seventh Circuit for review of the order of respondent. (R. 1206-1208; App. 528-529). Respondent requested enforcement of its order. (R. 1213-1217; App. 532-535).

The Court held the respondent's order was proper and allowed its request for enforcement. (*Post.* p. 15-24). It entered a decree identical with the respondent's order. (*Post.* p. 24-26).

The respondent found that petitioner had refused to bargain as required by Section 8(5) of the Act, in that

petitioner refused to insert, in the written contract which it was willing to execute with the Union, a clause granting the Union exclusive recognition as the representative of the employees in the appropriate unit; and that, by refusing to bargain, the petitioner engaged in unfair labor practices within the meaning of Section 8(1) of the Act.

The issue is whether an order and decree that petitioner "cease and desist from * * * in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act" are supported by the respondent's finding that petitioner had refused to bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit; there being neither any contention nor any finding of any other unfair labor practice.

B

STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A. Sec. 347(a). The United States Circuit Court of Appeals for the Seventh Circuit handed down its opinion on December 23, 1940, and entered a decree enforcing the respondent's order on January 16, 1941.

C

QUESTION PRESENTED

As petitioner has indicated, the question is whether a finding only that the petitioner has refused to bargain

collectively, by refusing to recognize the union as the exclusive representative of the employees, supports a decree that petitioner cease and desist from

> "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act."

D

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The decree of the United States Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of this Court in *National Labor Relations Board v. Express Publishing Company,* No. 442, decided March 3, 1941, 9 U. S. Law Week, p. 4240.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify to this Court for its review and determination, all proceedings in the case numbered and entitled on its docket No. 7269, McQuay-Norris Manufacturing Company, petitioner, vs. National Labor Relations Board, respondent; that the judgment of said Circuit Court of Appeals be reversed by this Honorable Court; and that

your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

McQuay-Norris Manufacturing Company

By

Alan W. Boyd,

Kurt F. Pantzer,

Charles M. Wells,

Frederic D. Anderson,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 116 Fed. (2d) 748-752, appears in the Record at pages ..... to ....., and is also printed in the Appendix to this brief, post p. 15-24.

II

JURISDICTION

A statement concerning jurisdiction appears under "B" on page 3 of the petition.

III

STATEMENT OF THE CASE

A statement of the case appears under "Summary Statement" on page 1 of the petition.

IV

SPECIFICATION OF ERROR

A specification of error is set forth under "Reasons Relied on for Allowance of the Writ" on page 4 of the petition.

V

SUMMARY OF ARGUMENT

The only act which petitioner was found by respondent to have done which constituted an unfair labor practice, was to refuse to embody in the signed agreement with the union a clause recognizing the union as the representative of all the employees in the appropriate unit, instead of just its own members.

There is nothing in the record or in the respondent's finding to indicate that petitioner had, or would in the future, engage in any of the unfair labor practices defined by the Act other than that defined in Section 8(5), which is also a violation of section 8(1).

The decree improperly subjects petitioner to contempt proceedings for alleged unfair labor practices unrelated to any which were committed, or which there was any likelihood of petitioner committing in the future.

ARGUMENT

I

The case at bar is in no material particular distinguishable from the case of *National Labor Relations Board v. Express Publishing Company*, No. 442, decided March 3, 1941, 9 U. S. Law Week, p. 4240. In each the employer was found to have refused to bargain collectively with the Union. This violation of Section 8(5) of the Act was also, in that particular, a violation of Section 8(1). In neither case did the record hint, or the Board find, that the employer had been guilty of, or contemplated committing, any unfair labor practice other than that defined in Section 8(5).

In each case the Board issued an order which directed the employer to cease and desist from refusing to bargain collectively with the Union and to cease and desist from

> "in any *other* manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act."

The word "other," which has been italicized in the quotation, appeared in the order in the case at bar. It did not appear in the order in the *Express Publishing* case. Otherwise the two orders are exactly as quoted. So, too, is the decree in the Circuit Court of Appeals in the present case.

This Court has decided in the *Express Publishing* case that such a decree, employing the broad language of Sections 7 and 8(1), cannot be entered in a case where there is no indication that the employer in the future would engage in any of the other unfair labor practices defined by the Act.

This case is in every respect as strong, and in many respects stronger, than the *Express Publishing* case. In that case the employer "refused to discuss in detail the proposals of the Guild, to make any counter proposals or to enter into any agreement with it."

In the case at bar petitioner bargained extensively and genuinely with the Union, and the only guilt found against it turned on the wording of the recognition clause. The findings of fact of the Board contain the following:

> "We have noted that on June 28, 1937, the respondent executed three collective agreements covering its Indianapolis, Connersville, and St. Louis plants, respectively, and that on March 25, 1938, the respondent opened negotiations with Locals 226, 315, and 231 for the modification and renewal of these agreements. The parties met in a series of conferences over a period of eight months. At these joint conferences the respondent and the locals discussed in detail various proposals and counter-proposals and arrived at a mutual understanding on vacations, grievances, and general policy as to hours of work and seniority. These negotiations included discussions of proposed terms of employment to be applied to employees without regard to their membership in the locals. The respondent and the locals agreed that specific terms of employment for each plant in furtherance of the general policies thus agreed upon would be determined at subsequent separate conferences between the respondent and the local involved.

"The form of recognition clause to be embodied in each of the three agreements was discussed at length at the joint conferences between the respondent and the three locals. The locals submitted the following proposed clause:

> The Company agrees to recognize the International Union, United Automobile Workers of America, through its affiliated plant locals as the sole bargaining agency for its employees.

"The respondent conceded, during the negotiations, that Local 226 represented a majority of the employees and that 'there wasn't room for two sets of representatives for group bargaining in the plant.' Nevertheless it refused to incorporate into the contracts the recognition clause requested by Local 226. After extended discussion, Marvin Belflower, representative of Local 231 proposed the following clause:

> The Company recognizes the Union as the sole collective bargaining agency for those employees who are affiliated with the Union; for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment; and during the term of this contract the Company will deal with them and no others; provided that any individual employee or group of employees shall have the right at any time to present grievances to the Company.

"The respondent agreed to this limited recognition clause and resolved to stand upon it." (R. 511-512.)

* * * * * *

"The only issue presented by this record is whether the respondent has engaged in unfair labor

> practices by refusing to accept the exclusive recognition clause submitted by Local 226 and insisting instead upon the limited clause quoted above." (R. 513.)

The opinion of the Circuit Court of Appeals, which is appended hereto, (post pages 15-24) contains no intimation of a broader controversy, or of any violation of the Act by the petitioner other than its insistence on a recognition clause which did not state that the Union was the sole bargaining agency for all employees in the unit.

The relations of the petitioner to the Union, and its attitude toward collective bargaining, have been so exemplary that one member of the Board, dissenting from its decision, said:

> "The record is clear that the respondent has not questioned the right of the union to represent its employees, that it recognized the union as the choice of the majority, that it bargained with union representatives whenever requested, and that its relationships with its employees have been governed by agreements with the union since the spring of 1937." (R. p. 523.)

There is no discernible danger supported by anything in the record that petitioner will commit other unfair labor practices in the future.

II

The reasons for the decision in the *Express Publishing* case apply with particular force here. This Court there held that "the National Labor Relations Act does not give the Board an authority, which courts cannot rightly

exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found." (9 U. S. Law Week, p. 4240, at 4242.)

This Court further said:

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union."

The employer in that case was actually refusing to reach a collective bargaining agreement. Petitioner, as appears from the findings already quoted, had signed written agreements with the Union locals in 1937, and still had such agreements with locals other than that in the particular plant involved when the hearing was held. Petitioner bargained "in a series of conferences over a period of eight months" with this local, over wages, hours, and other conditions of employment, and the negotiations failed to ripen into a new contract only because of differences over the recognition clause.

It is of great importance to petitioner that the decree should not continue in its present broad form. That fact was recognized by this Court in the *Express Publishing* case.

It may happen at some time in the future that the Board will charge petitioner with the discharge of a union employee because of his union membership. Or the Board may allege that a union existing at the plant at some time in the future is encouraged or dominated by petitioner. Or petitioner may refuse to employ an unfit applicant for employment, and may be confronted with the accusation that the refusal to employ was grounded on union membership. Or the Board may make against petitioner any one of numerous other charges of unfair labor practices which do not involve a refusal to bargain.

The Congress has established in Section 10 of the Act the procedure by which such charges shall be made and their truth determined. To the extent that petitioner has been found to have committed an unfair labor practice, and to be likely to commit it again in the future, petitioner should be enjoined against such practice. But Congress by its classification of unfair labor practices in the Act has indicated that they are not all of the same kind. Certainly those defined in Sections 8(2) and 8(3) differ from that of which petitioner was found guilty. And refusal to bargain, violating Section 8(5) is but a small part of the practices forbidden by the omnibus section 8(1).

Petitioner should not be required to conduct its business in the future in the shadow of possible contempt proceedings for every alleged unfair labor practice, no matter how remote in character from that found in the case at bar. Petitioner should not be subject to the penalties of contempt for such unrelated practices. To so decree, as the Circuit Court of Appeals has done, is to substitute the procedure and penalties of contempt for the procedure and remedies of the Act, for every charge of unfair labor practice after the first Board order is enforced. Congress clearly did

not so intend as this Court has clearly recognized in the recent opinion cited herein.

It is submitted that the decision of the United States Circuit Court of Appeals for the Seventh Circuit conflicts directly with the decision of this Court in *National Labor Relations Board v. Express Publishing Company*, No. 442, decided March 3, 1941, 9 U. S. Law Week, p. 4240. The petition should be granted and the judgment reversed.

Respectfully submitted,

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CHARLES M. WELLS,
FREDERIC D. ANDERSON,
Counsel for Petitioner.

APPENDIX

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, 116 Fed. (2d) 748:

MAJOR, Circuit Judge.

This case is before us on petition to review and set aside an order issued by the National Labor Relations Board (hereinafter called the "Board"), under Section 10(c) of the National Labor Relations Act (hereinafter called the "Act") (29 U. S. C. A. § 151, et seq.). In its answer to the petition, the Board has requested enforcement of its order. The charge was filed April 21, 1938, by Local 226 of the United Automobile Workers of America (hereinafter called "Local 226") upon which complaint issued February 11, 1939. Petitioner, by answer, denied the charge and a hearing was held from March 9 to 12, 1939. Jurisdiction is not in dispute, and so far as here material, the complaint, in conformity with the charge, alleged in substance that petitioner, on March 21, August 18 and 19, 1938, and at all times thereafter, refused to bargain collectively with Local 226 as the exclusive representative of petitioner's employees in an appropriate unit, and that by reason of such refusal, petitioner had engaged, and was engaging in unfair labor practices within the meaning of Section 8(1) and (5), and Section 2(6) and (7) of the Act.

Petitioner excepted to the report made by the Trial Examiner and participated in oral argument before the Board. On March 18, 1940, the Board rendered its decision, setting forth its findings of

fact, conclusions of law, and order. We see no occasion to set forth in detail the Board's decision. It is sufficient, for the purpose of the case, to state that it found petitioner guilty of the unfair labor practices as charged. In accordance with its decision, the Board ordered petitioner, (a) upon request, to bargain with Local 226 as the exclusive representative in the appropriate unit; to embody any understanding reached in a signed agreement, and, if requested, to incorporate an exclusive recognition clause in said signed agreement; and (b) to post appropriate notices.

In the beginning, it is important to note that on March 25, 1938, and at all subsequent times, Local 226 was the duly designated representative of a majority of the employees in the appropriate unit for the purpose of collective bargaining. This was found by the Board, and at all times material to this inquiry, has been recognized by petitioner.

The ultimate question for decision is whether petitioner is guilty of an unfair labor practice in refusing to recognize Local 226 as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours and other conditions of employment.

While the issue in dispute appears to be legal rather than factual, it seems pertinent to give a brief resumé of the facts prior to and during the time it is charged petitioner refused to grant exclusive recognition. Petitioner has its principal office and place of business in St. Louis, Missouri, and operates three plants: One in St. Louis, Missouri, one in Connersville, Indiana, and one in Indianapolis, Indiana. Each of these plants has a local union,

all affiliated with the United Automobile Workers of America. Local 226 is the union representative of petitioner's plant at Indianapolis, and the controversy in dispute is between petitioner and this Union. All of petitioner's plants are engaged in the manufacture and sale of automotive products. Petitioner, both before and subsequent to the enactment of the Act, jointly bargained with the designated representatives of the employees at its three plants. As early as March 25, 1937, petitioner was requested to recognize the locals representing the employees at the different plants, as the sole collective bargaining agencies of petitioner's employees at such plants. At that time, Arden J. Mummert (director and vice-president of petitioner, who was in charge of all bargaining negotiations) by letter, suggested: "the Company recognize the Union as the sole collective bargaining agency for those employees of the Company who are members of the Union."

On April 12, 1937, an agreement was reached between petitioner and the St. Louis Local which, under the heading "Recognition and Representation" stated: "The Company recognizes the Union as the sole collective bargaining agency for those employees of the Company who are members of the Union. Any employee who is not a member of the Union and wishes to bargain or state a grievance to the Management may continue to do so. Any benefits in wages or working conditions resulting from bargaining by any individual or group will automatically be extended to all employees on similar operations under like conditions, whether they belong to the Union or not."

The Connersville Local also requested an exclusive recognition clause, but after negotiation, on

June 4, 1937, approved a written agreement containing the same recognition clause as that incorporated in the agreement with the St. Louis Local.

Local 226, early in 1937, also proposed that the agreement with it contain an exclusive recognition clause. The agreement consummated, however, contained the same clause in this respect as had been included in the agreement with the other locals. Upon the request of Local 226 that petitioner explain the recognition clause, a letter was written by Mummert to the effect that no other labor organization would be recognized or dealt with, and that no outside labor organization would be encouraged. The agreements with all three locals, by their terms, were effective until April 12, 1938. In March, 1938, a joint conference was had between Mummert and representatives of the three locals, with a view of renewing the 1937 agreements with such modifications as might be agreed upon. Again, each of the Locals proposed that petitioner recognize such Locals as the sole bargaining agencies for employees in the appropriate unit in the three plants respectively. Later, many conferences were had concerning the recognition clause, as well as other requests made by the three Locals, but at all times petitioner refused to incorporate into the proposed agreements the requested recognition. Mummert testified at the hearing that at a meeting held on April 12, 1938, "the big issue was still the actual wording of a recognition clause in the 1938 agreement."

Shortly thereafter, charges were filed with the Board against petitioner by Local 226 as related heretofore. Charges were also preferred about the same time by the St. Louis and Connersville Locals. On August 18, 1938, negotiations were renewed, which continued for several days. The

main controversy was still the form of the recognition clause. Numerous proposals were made in this connection, both by the Union representatives and petitioner, all of which were rejected.

On August 18, Belflower, a representative of the St. Louis Local, proposed a clause (hereinafter called the "Belflower clause") which, with some modifications, was accepted by the petitioner. This clause is the one around which this controversy largely revolves, and is: "The Company recognizes the Union as the sole collective bargaining agency for those employees who are affiliated with the Union; for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment; and during the term of this contract the Company will deal with them and no others; provided that any individual employee or group of employees shall have the right at any time to present grievances to the Company." The agreement, containing this clause, was submitted to the respective Locals and approved by the St. Louis and Connersville Locals. Thereupon, the charges theretofore filed with the Board by these Locals, were withdrawn. There is some dispute as to whether the agreement was approved by Local 226. We think it is rather clear, however, that such approval as was given by this Local, insofar as it concerned recognition, was conditioned upon the decision of the Board upon the charge then pending. On October 14, 1938, and January 12, 1939, Local 226, in conference between its representatives and petitioner, again insisted that it was entitled to an exclusive recognition clause, which it was unable to obtain.

[1] Petitioner argues, (1) that the Belflower clause is not susceptible of the conclusion that recognition required by 9(a) was denied, and (2)

that irrespective of the construction given this clause that there was, as a matter of fact, exclusive recognition. We are of the opinion that petitioner's position is clearly inconsistent with the statutory command that "* * * a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." This is so whether the Belflower clause be considered independently or in connection with other facts and circumstances. There is no escape from the conclusion that the words "for those employees who are affiliated with the Union" place a limitation upon the recognition granted, which can not be reconciled with the plain language of the Statute.

[2] If there be any doubt in this respect however, it is dispelled by the controversy concerning recognition which was paramount at the numerous conferences had between petitioner and the Locals, including Local 226. In the first place, the recognition required by 9(a) is not a bargaining matter as petitioner sought to make it. When it was disclosed to petitioner that Local 226 represented a majority of the employees in the appropriate unit, (this was at no time questioned by petitioner) the obligation was then fixed upon it to recognize the Local as the sole and exclusive bargaining agent, not only for the members of the Union, but for all employees. In place of complying with this statutory requirement, petitioner made it the subject of a long and extended bargaining process. Subsequent to the time when demand for recognition was made, petitioner, at all times, has been in default of its statutory obligation. Neither can the consequences of its refusal to grant complete recognition be dissipated by the fact—if it be a fact—that it bargained with the Union on all other matters in dispute.

In our view of the situation, there could be no genuine bargaining as contemplated by the Statute until complete recognition had been granted as the Act requires. Notwithstanding the fact that it agreed not to bargain with any other group or individual, its bargaining with Local 226, while limiting its recognition solely to members of the Union, made such bargaining abortive and of little, if any, effect.

[3] One member of the Board dissented, holding to the view that the complaint should be dismissed. We think a fair interpretation of his dissent is that notwithstanding petitioner's limited recognition, it did, as a matter of fact, bargain with the Union; that the agreement reached as a result of such bargaining was approved by its members, and that, therefore, the question of recognition had become moot. Such a construction of the Act would result in serious impairment of the right granted employees to organize and bargain through the agency designated by a majority of the members of the appropriate unit. It would confer upon the employer the option of bargaining concerning a matter guaranteed the employee as of right, and which, as we have said, is not a bargaining matter. Nor do we think it is material, under the circumstances of this case, whether the limited recognition granted by petitioner was, or was not, approved by members of Local 226. If so, it could mean nothing more than that the Union, after engaging in a controversy for more than a year regarding its right to complete recognition, consented to accept the most it could obtain of a right to which it was entitled for the asking. A consent given under such circumstances can not be utilized by petitioner to relieve it of its statutory duty to grant complete recognition. In this connection, it seems pertinent to point out that when the Union was denied recognition in defiance of the

Statutory mandate, it placed its reliance upon the Board to require petitioner to concede that about which there was no room for controversy. That the Union pursued this lawful and peaceful method is to its credit.

[4] Neither is there any merit in petitioner's argument that it refused exclusive recognition for fear that such a clause would bring about reprisals by rival unions. It is pointed out that many of its customers, as well as a few of its employees, were members of a rival union, and that complete recognition of Local 226 would incur their disfavor and thus adversely affect petitioner's business. We are convinced from a reading of the testimony that Mummert's reasoning in this respect was in good faith, but even so, such a position can not afford petitioner any justification for its position. The Statutory requirement under discussion permits no immunity because of undue hardship or economic pressure imposed upon the employer. It leaves no room for the appeasement of hostile interests by conceding to a Union, properly designated as the bargaining agent, less than the Act requires.

The argument advanced that petitioner was not required to grant complete recognition because the Belflower clause failed to follow the precise language of the Statute, or set out the exact unit found appropriate by the Board, must also fall by the wayside. In the first place, petitioner at no time raised any question but that the Union was the properly designated barganing agent, and in the second place, when thus apprised and requested, had no alternative but to grant complete recognition, and this, irrespective of the language contained in the clause finally presented by the Union in an

effort to compromise a situation for which petitioner alone was responsible.

We therefore conclude that petitioner refused to grant recognition as the Act commands, and that its refusal constitutes an unfair labor practice as charged in the complaint and as found by the Board.

[5] We are still confronted with the affirmative portion of the Board's order which requires petitioner "to embody any understanding reached in a signed agreement, and, if requested, to incorporate an exclusive recognition clause in said signed agreement." Petitioner contends that the Act does not require that recognition be reduced to writing, and further, that there is no obligation on the part of an employer to reduce to writing agreements reached as a result of collective bargaining. A number of decisions[1] of this court are cited in support of this position. We are of the opinion that these decisions are not controlling for the reason that the issue here is different from that decided in those cases. Here, the undisputed fact is that petitioner never, at any time, refused a written recognition clause. In fact, it proposed such a clause in writing, consented to the Belflower clause, and incorporated it in a written agreement. What might have been the obligation of petitioner with reference to a written recognition clause, had the question been raised at an opportune time, need not be decided. It is sufficient to decide that, having proposed and agreed to a written recognition clause which failed to comply with the Act, it can not now

[1] Inland Steel Co. v. National Labor Relations Board, 7 Cir., 109 F.2d 9, 22; Fort Wayne Corrugated P. Co. v. National Labor Relations Board, 7 Cir., 111 F.2d 869; Stewart Die Casting Corp. v. National Labor Relations Board, 7 Cir., 114 F.2d 849.

be heard to complain when required to grant written recognition in conformity with the Act.

We are also of the opinion that the same reasoning applies to petitioner's objection to a signed contract incorporating any further agreement reached by the bargaining process. There exists a written contract entered into by petitioner and Local 226, the provisions of which are not here material. It is sufficient to state that, in addition to the limited recognition clause, the contract is a lengthy one and purports to constitute a working agreement between petitioner and its employees. When this contract was signed by petitioner, no question was raised as to its right to refuse to sign. Thus, no question is raised as to the requirement of the Act in this respect. Petitioner has conceded a written contract and now is in no position to contend to the contrary. Such a situation is clearly distinguishable from those cases in which we have held that a written agreement is not required by the terms of the Act.

We therefore are of the opinion that the Board's order is proper and its request for enforcement is allowed.

The decree of the United States Circuit Court of Appeals for the Seventh Circuit (which is identical with the order of the National Labor Relations Board):

The National Labor Relations Board having issued an order against McQuay-Norris Manufacturing Company on March 18, 1940, and McQuay-Norris Manufacturing Company having petitioned this Court for a review of said order, this Court having

considered the same, and having on December 23, 1940, issued its decision enforcing said order, it is hereby:

ORDERED, ADJUDGED AND DECREED, that McQuay-Norris Manufacturing Company and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Automobile Workers of America, Local 226, as the exclusive representative of the production employees at its Indianapolis plant, excluding clerical and supervisory employees;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Automobile Workers of America, Local 226, as the exclusive representative of the production employees at its Indianapolis plant, excluding clerical and supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment; if an understanding is

reached on such matters, embody said understanding in a signed agreement; and, if requested to do so by Local 226, incorporate in the signed agreement a clause granting to Local 226 exclusive recognition as collective bargaining agency for all employees in the appropriate unit;

(b) Post immediately in conspicuous places throughout its Indianapolis plant, and maintain for a period of at least sixty (60) consecutive days, notices stating to its employees that the respondent will cease and desist in the manner set forth in 1 (a) and (b) and that it will take the affirmative action set forth in 2 (a) of this Order;

(c) Notify the Regional Director for the Eleventh Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 862

MCQUAY-NORRIS MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 15–24)[1] is reported in 116 F. (2d) 748. The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. 507–523) are reported in 21 N. L. R. B., No. 72.

[1] The symbol "Pet." refers to the petition; "Pet. App." refers to the appendix attached to the petition; and "App." refers to the printed record below.

JURISDICTION

The decree of the court below was entered on January 16, 1941 (Pet. App. 24–26). The petition for a writ of certiorari was filed March 21, 1941. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The only question urged in the petition for certiorari is one which has not heretofore been raised in this case and which we therefore think is not properly presented. It is whether the Board's cease and desist order, enforced by the court below, is too broad, in the light of this Court's decision in *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (App. 507–523). The Board's findings, which are not contested, may be briefly summarized as follows:

Petitioner met with representatives of the United Automobile Workers of America, Local 266, in a series of conferences over a period of 8 months to negotiate a collective agreement for its Indianapolis plant (App. 511–513). Throughout

these conferences, petitioner recognized that Local 226 represented a majority of the employees at its Indianapolis plant (App. 512). Petitioner refused, however, to incorporate into the agreement the exclusive recognition clause requested by Local 226 and insisted, instead, upon a limited clause which recognized Local 226 "as the sole collective bargaining agency for those employees who are affiliated with the Union" (App. 512–513). As a result of petitioner's refusal to incorporate an exclusive recognition clause, no contract was executed (App. 513). The Board found that this conduct of petitioner constituted a refusal to bargain collectively with Local 226 as the exclusive representative of its employees in an appropriate unit, and thereby interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (5) and (1) of the Act (App. 517, 520, 521).

Upon the foregoing findings, the Board ordered petitioner to cease and desist from (a) refusing to bargain with Local 226 as the exclusive representative of its Indianapolis employees in the appropriate unit, (b) in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, and (c) to take certain affirmative action not here in issue (App. 522).

The court below enforced the Board's order as issued (Pet. App. 24, 25).

ARGUMENT

Petitioner contends (Pet. 8–9, 14) that the decree below, insofar as it enforces the provision of the Board's order requiring petitioner to cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, is contrary to the subsequent decision of this Court in *National Labor Relations Board* v. *Express Publishing Company,* No. 442, this Term, decided March 3, 1941. But in the present case petitioner raised no question in the court below concerning this provision; it was not specifically challenged either in the petition for review (App. 528–531) or in petitioner's briefs.[2] The court below made no mention of the provision, even in its summary of the Board's order (Pet. App. 23–24), and no petition for rehearing was filed. This Court has recently indicated that under such circumstances it does not regard questions of the validity of particular provisions of Board orders as properly raised. *Viking Pump Co.* v. *National Labor Relations Board,* certiorari denied, No. 606, this Term; *J. Greenebaum Tanning Co.* v. *National*

[2] Petitioner's briefs below attacked the Board's findings and order as not supported by substantial evidence, and the power of the Board to require a recognition clause to be embodied in a contract; they made no mention of the cease and desist provisions. Brief and reply brief for petitioner, No. 7269, October Term, 1939, Circuit Court of Appeals for the Seventh Circuit.

Labor Relations Board, certiorari denied, No. 152, this Term; *Subin* v. *National Labor Relations Board,* certiorari denied, No. 280, this Term. In these cases the so-called "work-relief" provision was not contested in the lower courts but was urged as one of the reasons for granting certiorari. And in the *Viking Pump* case, the petition was filed after the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, invalidating the "work relief" provision.

CONCLUSION

The petition presents no question which is properly raised; it should, therefore, be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
ROBERT B. WATTS,
General Counsel, National Labor Relations Board.

APRIL 1941.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 157, 158, 159, 160) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.
>
> SEC. 10 (e). * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

McQUAY-NORRIS MANUFACTURING COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 862.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF McQUAY-NORRIS MANUFACTURING COMPANY, PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF McQUAY-NORRIS MANUFACTURING COMPANY, PETITIONER

STATEMENT

The facts are not in dispute. They have been correctly stated both in petitioner's brief in support of the petition, and in the opposition brief of respondent.

The question presented by the petition is whether the order of the Board, enforced by the Court below, is too broad, in the light of this Court's decision in *National Labor Relations Board v. Express Publishing Co.,* No. 442, this Term, decided March 3, 1941. Respondent's brief has not attempted to meet this question, but has contended solely that the question is not properly raised, on the ground that it was not presented below.

SUMMARY OF ARGUMENT

A. This Court should grant the petition in this case even if the question was not raised below. The cases cited by respondent involved orders completely satisfied by the payment of a single sum of money. The decree in this case involves a perpetual possibility of contempt proceedings.

B. The question was raised in the court below.

C. Respondent has refused to join in a motion to modify the decree in the court below.

ARGUMENT

A

There is a vital distinction between the erroneous decrees in the *Greenebaum, Subin,* and *Viking Pump* cases, cited by respondent, and the error in the case at bar. The decree in those cases could be complied with, and the obligation of the employer discharged, by one payment of a definite sum of money. The burden on petitioner is not as definite, not as limited in time, nor is it solely pecuniary in its nature. Petitioner has been perpetually enjoined. It must do business forever in the shadow of possible contempt proceedings. It is subject to a possible succession of fines. Its officers and agents are liable to imprisonment if held to have violated the injunction.

Petitioner is therefore subject to great penalties of uncertain character and indefinite duration, a circumstance very different from that in the cases cited by respondent. This Court should exercise its discretion to relieve petitioner of this decree, which it has said, in the case of *National Labor Relations Board v. Express Publishing Company,* No. 442, decided March 3, 1941, the Board is not justified in making, nor are courts "required for the indefinite future to give effect in contempt proceedings to an order of such breadth."

The review of this case will take little of this Court's time. It is directly governed by the *Express Publishing* case. A simple reference to that case is a sufficient opinion to explain the decision of this one for petitioner.

B

Respondent is not accurate in its statement that no question was raised in the court below respecting the Board's order that petitioner cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act. In the statement of points filed with and made part of the petition for review petitioner asserted:

> "6. Said National Labor Relations Board erred in matter of law in ordering respondent to post notices that it would cease and desist from refusing to bargain collectively with United Automobile Workers of America, Local 226, or would cease and desist from in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act." (R. 1210-11; App. p. 531.)*

It appears from the dissenting opinion in this Court in the *Express Publishing* case, that the employer there did not object, in the Circuit Court of Appeals, to the provision of the Board's order which this Court modified, either in its brief or otherwise.

C

Since the order in this case is unlawful, as this Court has recently decided in the *Express Publishing* case; and since respondent has not in its brief contended that there is any distinction between the two cases; it is difficult to see with what justification respondent resists the petition.

---

* "App." refers to the printed record below, which was the appendix to petitioner's brief in the Circuit Court of Appeals. "R" refers to the original record certified by the Board to the Circuit Court of Appeals.

Petitioner has asked respondent by letter to join in a motion in the Circuit Court of Appeals to revise the decree. Respondent's position is set forth in a letter appended to this brief. This Court should not exercise its discretion to permit respondent, an agency of the Government, to preserve a wrong that cannot be terminated by the doing of an act or series of acts, but will continue for the future.

CONCLUSION

The petition presents a question which is properly raised; and if not properly raised, a question which this Court in its discretion should review.

Respectfully submitted,

ALAN W. BOYD,
KURT F. PANTZER,
CHARLES M. WELLS,
FREDERIC D. ANDERSON,
Counsel for Petitioner.

APPENDIX

National Labor Relations Board
Washington, D. C.
Office of the General Counsel

March 28, 1941

Kurt F. Pantzer, Esquire
Barnes, Hickam, Pantzer & Boyd
1313 Merchants Bank Building
Indianapolis, Indiana

Re: McQuay-Norris Mfg. Co. v. National Labor Relations Board.

Dear Mr. Pantzer:

I have your letter of March 25 and thank you for the copies of the Petition for Certiorari. I feel that inasmuch as you have filed your petition raising as a sole question the propriety of the decree heretofore entered by the Court, it would serve little useful purpose to discuss at this time any modification of the decree.

Sincerely yours,

ROBERT B. WATTS,
General Counsel.

Enc.